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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

SEAN PATRICK MAHONEY,

Defendant and Appellant.

E065891

(Super.Ct.No. FVI1102874)

OPINION

APPEAL from the Superior Court of San Bernardino County. John P.

Vander Feer, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Anthony Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Sean Patrick Mahoney appeals from the trial court's denial of his petition under Penal Code section 1170.18 to have his felony conviction for driving or taking a vehicle under Vehicle Code section 10851, subdivision (a), reduced to a misdemeanor. We affirm.

FACTS AND PROCEDURE

On December 14, 2011, defendant drove or took a 1992 Honda Prelude. He was previously convicted of driving or taking a vehicle in 1995.

On December 22, 2011, the People filed a felony complaint charging defendant in count 1 with receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a)) and in count 2 with unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a)). The People alleged as to both counts that defendant had a prior conviction for Vehicle Code Section 10851, subdivision (a), and that defendant had eight prison term priors (Pen. Code, § 667.5, subd. (b)).

On January 3, 2012, defendant pled no contest to count 2 and admitted the prior conviction for unlawfully driving or taking a vehicle. As agreed, the court dismissed count 1 and struck the eight prison term priors. Also as agreed, the court sentenced defendant to the middle term of three years in county prison.

On March 10, 2016, defendant filed a petition for resentencing asking to have his conviction for taking or driving a vehicle reduced to a misdemeanor. Also on that date, the People filed a response, arguing that Vehicle Code section "10851 is not affected by Prop. 47." After a hearing held on April 15, 2016, the trial court denied the petition.

During the hearing, defense counsel indicated that “this was a 1992 Honda Prelude, and according to Kelley Blue Book the value of the vehicle would be approximately \$706.”¹

This appeal followed.

DISCUSSION

Defendant contends that a violation of Vehicle Code section 10851 is a theft crime within the scope of Proposition 47 and Penal Code section 1170.18, and thus the trial court erred when it denied his petition. He further contends that the failure to treat a violation of Vehicle Code section 10851 as a misdemeanor when the value of the vehicle is less than \$950 violates equal protection principles.

1. Standard of Review

When interpreting a voter initiative, “we apply the same principles that govern statutory construction.” (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) We first look “ ‘to the language of the statute, giving the words their ordinary meaning.’ ” (*Ibid.*) We construe the statutory language “in the context of the statute as a whole and the overall statutory scheme.” (*Ibid.*) If the language is ambiguous, we look to “ ‘other indicia of the voters’ intent, particularly the analyses and arguments contained in the official ballot pamphlet.’ ” (*Ibid.*)

¹ As the People point out in their responsive brief, defense counsel did not establish or even specify whether the \$706 was the stolen vehicle’s value at the time of the hearing in 2016 or at the time of the crime in 2011. As defendant points out, the People did not dispute the proffered value at the hearing. For the purpose of this appeal we assume, but do not decide, that the vehicle’s value was less than \$950.

2. Overview of Proposition 47 and Penal Code Section 1170.18

On November 4, 2014, voters approved Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) Proposition 47 reduced certain drug- and theft-related crimes from felonies or wobblers to misdemeanors for qualified defendants and added, among other statutory provisions, Penal Code section 1170.18. Penal Code section 1170.18 creates a process through which persons previously convicted of crimes as felonies, which would be misdemeanors under the new definitions in Proposition 47, may petition for resentencing. (See *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108-1109.)

Specifically, Penal Code section 1170.18, subdivision (f), provides: “A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [Proposition 47] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors.”

As relevant to the present case, Proposition 47 added Penal Code section 490.2, which provides as follows: “Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor, . . .” (Pen. Code, § 490.2, subd. (a).)

3. Applicability of Proposition 47 to Vehicle Code Section 10851 Offenses

Penal Code section 1170.18, subdivision (a), lists the offenses for which relief may be appropriate: “Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code.” Vehicle Code section 10851 is not one of the listed offenses. Defendant nonetheless contends that because Vehicle Code section 10851 is a theft offense, and Penal Code section 1170.18 explicitly applies to theft offenses through Penal Code section 490.2 when the value of the property taken is less than \$950, Penal Code section 1170.18 must also apply to violations of Vehicle Code section 10851. That issue is presently before the California Supreme Court. (*People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Gomez* (2015) 243 Cal.App.4th 319, review granted May 25, 2016, S233849; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344, among others.)

The crux of defendant’s argument is that Vehicle Code section 10851 was indirectly amended by virtue of Penal Code section 490.2’s reference to Penal Code section 487, and the circumstance that Vehicle Code section 10851 is a lesser included offense of Penal Code section 487, subdivision (d)(1). On its face, however, Penal Code section 490.2 does no more than amend the definition of grand theft, as articulated in Penal Code section 487 or any other provision of law, redefining a limited subset of offenses that would formerly have been grand theft to be petty theft. (Pen. Code, § 490.2.) Vehicle Code section 10851 does not proscribe theft of either the grand or petty

variety, but rather the taking or driving of a vehicle “with or without intent to steal.” (Veh. Code, § 10851, subd. (a); see also *People v. Garza* (2005) 35 Cal.4th 866, 876 [Veh. Code, § 10851, subd. (a) “ ‘proscribes a wide range of conduct,’ ” and may be violated “ ‘either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).’ ”].) Thus, we conclude Penal Code section 490.2 does not apply to defendant’s conviction offense.

4. Equal Protection

Defendant also contends that equal protection principles require that his conviction for unlawfully taking a vehicle in violation of Vehicle Code section 10851 be treated in the same manner as a conviction for grand theft auto in violation of Penal Code section 487, subdivision (d)(1). (See fn. 1.) We disagree. Applying rational basis scrutiny, the California Supreme Court has held that “neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor’s discretion in charging under one such statute and not the other, violates equal protection principles.” (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838.) Similarly, it has long been the case that “a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code.” (*People v. Romo* (1975) 14 Cal.3d 189, 197.) The same reasoning applies to Proposition 47’s provision for the possibility of sentence reduction for a limited subset of those previously convicted of grand theft (those

who stole an automobile or other personal property valued \$950 or less), but not those convicted of unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. Absent a showing that a particular defendant “ ‘has been singled out deliberately for prosecution on the basis of some invidious criterion,’ . . . the defendant cannot make out an equal protection violation.” (*Wilkinson*, at p. 839.) Defendant here has made no such showing.

To be sure, “Vehicle Code section 10851 is not classified as a ‘serious felony,’ and it is not as serious as crimes in which violence is inflicted or threatened against a person.” (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321.) It is not unreasonable to argue that the same policy reasons motivating Proposition 47’s reduction in punishment for certain felony or wobbler offenses would also apply equally well to Vehicle Code section 10851. Nevertheless, if Proposition 47 were intended to apply not only to reduce the punishment for certain specified offenses, but also any lesser included offenses, we would expect some indication of that intent in the statutory language. We do not find this. The role of the courts is not to insert changes to the Penal Code or Vehicle Code beyond those contained in the plain language of Proposition 47.

DISPOSITION

The order appealed from is affirmed.

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CUNNISON*

J.

We concur:

RAMIREZ

P. J.

McKINSTER

J.

* Retired judge of the Riverside Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.